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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 973

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
HESS OIL & CHEMICAL CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions below are correctly cited in the Petition.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

QUESTION PRESENTED

Whether a Board finding that an employer was lawfully motivated in locking out its employees meets the substantial evidence test, where supported, in part, by the finding that the employer would have locked out the employees even if a nonmandatory bargaining issue had not been present in the negotiations.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*) are reproduced in the Petition at pages 2-3.

STATEMENT

This case involves a lockout by Hess Oil & Chemical Corporation (hereinafter referred to as "Hess" or "Company") to bring pressure upon the Oil, Chemical & Atomic Workers International Union (hereinafter referred to as the "Union") to modify its collective bargaining position.

On January 27, 1963, Hess executed an agreement with Delhi-Taylor Oil Refining Company to purchase certain of the latter's properties, including an oil refinery at Corpus Christi, Texas. On March 8, 1963, a representative of Hess met with representatives of the Union and advised them that Hess had purchased the refinery, that it would not assume the existing collective bargaining agreement, and that it was desirous of negotiating a new agreement (A. 36).[1]

Many issues were discussed during the subsequent negotiations, including a proposal by Hess to exclude the warehouse and laboratory employees from the bargaining unit. Failing to reach agreement on any major item, Hess locked out its employees on April 1, 1963 (A. 38-39).

The National Labor Relations Board issued an initial decision on September 16, 1964 (A. 44-47). In accordance with its prevailing rule that any lockout for the purpose of forcing acceptance of bargaining proposals was an unfair labor practice, the Board held the lockout violated sections 8(a)(1) and (3) of the Act. While the case was

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[1] All page references are to the Appendix to the Petition.

on appeal to the court below, this Court issued its decision in *American Ship Building Co.* v. *NLRB,* 380 U. S. 300 (1965), overruling the Board's position in prior lockout cases. At the Board's request, the court below stayed its proceedings to permit the Board to reconsider its decision in light of *American Ship Building.* Thereafter the Board made supplementary findings in this case, concluded that *American Ship Building* was dispositive and that the lockout was lawful, stating:

> In view of the foregoing and as the record indicates that Respondent was not motivated by union animus or in furtherance of an unlawful bargaining position, we find that Respondent's lockout did not violate Section 8(a)(3) or (1) of the Act. (A. 41).

Based upon a thorough analysis of the particular facts surrounding the case, the Board concluded that Hess's bargaining unit proposal did not affect the legality of the lockout. The decisive findings which the court below held were "unquestionably supported by substantial evidence" are:

> (1) the insistence on the exclusion of the warehouse and laboratory workers from the bargaining unit did not frustrate collective bargaining on other issues and did not contribute to an impasse on the other issues;
>
> (2) there was no evidence that Hess conditioned the signing of a contract upon the union's acceptance of Hess's proposal for the bargaining unit exclusion;
>
> (3) the union's rejection of Hess's contract proposals was due neither "solely" nor "primarily" to Hess's insistence on the exclusion of the warehouse and laboratory employees;
>
> (4) that Hess would have locked out its employees even had the bargaining unit issue been withdrawn from negotiations; and

(5) that the lockout was not prompted by anti-union animus. These findings are unquestionably supported by substantial evidence. (A. 31-32).

The court of appeals denied the Union's petition for review of the lockout issue, thereby affirming the Board's dismissal of the allegation of the complaint which the Petition here concerns.

ARGUMENT

The sole question for review, when reduced to its essence, is whether the Board's findings are supported by substantial evidence on the record considered as a whole, and that ". . . is a question which Congress has placed in the keeping of the Court of Appeals." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951). The Union attempts to escape this fact by focusing the Court's attention on a single finding of the Board and then contending that the finding is "speculative" and insufficient under *American Ship Building Co.,* to support the conclusion that the lockout was lawfully motivated. The record is clear that the Board's conclusion that the lockout was lawful is grounded on the combination of findings enumerated above, and the Union's arguments for granting the writ fade when exposed to these additional facts.

I.

THERE IS NO CONFLICT WITH OTHER DECISIONS

The Union's argument begins with the false premise that the *sole* finding, underlying the decision of the Board and the court below was that Hess would have locked out its employees in the absence of the disagreement over the composition of the bargaining unit.[2] Based on that false

[2] The Petition calls this finding of fact a "theory" (Pet. 8).

premise, various arguments are made that the decision below is in conflict with other decisions and raises novel legal questions.

Contrary to the Union's contention, the Board clearly stated that its decision was based upon a combination of findings of fact, including findings that Hess's proposal was not designed to frustrate bargaining on other issues and did not contribute to the impasse on those issues, that the Union's rejection of Hess's other proposals was not due to the presence of the permissive issue, and that the lockout was not prompted by anti-union animus or in furtherance of an unlawful bargaining position (A. 40-41).

In reconsidering its original decision in the light of *American Ship Building*, the Board was particularly careful to conform its decision to the guidelines established therein (A. 40-41). In *American Ship Building* this Court held that it is entirely permissible for an employer to lock out its employees to foster its bargaining position if the employer's conduct was not motivated by anti-union intent, was not inherently destructive of union interests, and did not manifest hostility toward the collective bargaining process. The Board made the following detailed findings of fact in the present case, that conformed the Company's conduct here with those guidelines:

(1) the lockout of the employees was designed to bring economic pressure on the Union to compel it to sign a new contract (A. 38-39).

(2) the Company was not motivated by anti-union animus (A. 41).

(3) the Company did not take this action in furtherance of an unlawful bargaining position (A. 41).

(4) the record contained overwhelming evidence that demonstrates that the Company desired to enter

into a contract and engaged in good faith bargaining to that end (A. 37).

(5) the permissive issue did not cause the bargaining impasse between the parties and the Company was not refusing to sign an agreement on that ground and would have locked out the employees even if the issue had been withdrawn because they were far apart on all major issues (A. 37-38; 40-41).

(6) the permissive issue was not designed to frustrate the bargaining on other issues (A. 40).

The Union's claim that the decision below undermines the rule in *NLRB* v. *Wooster Div., Borg-Warner Corp.*, 356 U.S. 342 (1958), that bargaining will be impeded if this case stands, and the argument based upon an analogy to strike and discharge cases, as discussed under II of the Petition, are swept away by the *findings set out heretofore which are obviously pertinent, but omitted from the Petition.*

The argument ignores the salient findings of fact in this case. It is noteworthy that the same tactic employed by the Union here met with failure in *O.C.A.W. Local 3-89* v. *NLRB*, 405 F.2d 1111 (D.C. Cir. 1968). In that case the Union's argument that the lockout was unlawful was rejected because it was based upon an erroneous premise of the employer's *purpose* for imposing the lockout.

II.

THE DECISION BELOW IS CORRECT

The specific Board finding seized upon by the Union in an effort to gain review of this case was that "Respondent would have locked out its employees even if the issue as to the unit status of laboratory and warehouse employees had been withdrawn from negotiations." (A. 40). In mak-

ing that finding, the Board was merely applying the "but for" test as a practical vehicle to measure the Company's motive. The Board found that Hess's motive was lawful because the bargaining unit question did not cause the lockout. Unquestionably, the employer's motive was crucial to the decision in *American Ship Building*. Hence, it was not only proper, but necessary for the Board to inquire into Hess's motives in this case.

The thrust of the Union's entire argument is that the result of this test is "speculative," and therefore unreliable. This test, however, is customarily used by the Board where the determination of motive is required. In *NLRB* v. *Whitfield Pickle Co.*, 374 F.2d 576, 582 (5th Cir. 1967), the test was articulated as follows, "We reiterate that all that need be shown by the Board is that the employee would not have *field Pickle Co.*, 374 F.2d 57[illegible] (5th Cir. 1967), the test was articulated as follows, "We reiterate that all that need be shown by the Board is that the employee would not have been fired *but for* the anti-union animus of the employer." Certainly the application of that test to measure motive is not novel and its use in this case does not warrant granting the writ.

Semantics cannot convert the Union's simple disagreement with the Board's findings into some unresolved legal question, as the Union would have the Court believe. Contrary to the Union's claim, *American Ship Building* and *Borg-Warner* stand inviolate by the decisions below. The Board's findings are based upon the exercise of its expertise, an appreciation of the particular facts surrounding the negotiations and a consideration of the record as a whole. The Board's conclusion was reached by careful analysis of all the testimony, upon drawing inferences, and making credibility findings.

This Court has recognized that its function is not served by engaging in the review of cases that turn upon an analysis of the particular facts for that function has been delegated to the courts of appeals. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440 (1918). Where, as here, a court of appeals holds that the Board's findings are supported by substantial evidence, its decision should not be disturbed.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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